87-327

FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

William Ray Wheeler, Petitioner

v.

Arvon Arave, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John C. Lynn
Lynn, Scott & Hackney
1024 W. Hays
Boise, Idaho 83702

Counsel for
Petitioner

QUESTIONS PRESENTED

The questions presented are:

(1) Whether the Appellant was denied his right to be informed of the nature and cause of the accusation under the 6th and 14th Amendments.

(2) Whether the Appellant was denied the right to testify and therefore denied the right to due process under the 5th, 6th and 14th Amendments.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Opinions Below	iii
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	3
Reasons for Granting Writ	6
Conclusion	8
Appendix A Memorandum of the United States Court of Appeals for the Ninth Circuit of June 8, 1987	9
Certificate of Service	13

OPINIONS BELOW

The Memorandum Decision and Judgment of the United States Court of Appeals for the Ninth Circuit is unreported and printed in Appendix A, hereto, infra, page 6.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 8, 1987. The jurisdiction of the Supreme Court is invoked under 28 USC Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .

Fourteenth Amendment:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The salient facts of the case are as follows. The Petitioner, William Ray Wheeler, was convicted of Murder in the Second Degree and sentenced to serve an indeterminate life sentence by an Idaho district court. The charging document alleged the following:

COUNT I

> That the defendant, William Ray Wheeler, on or about the 22nd or 23rd day of March, 1984, in the County of Ada, State of Idaho, did wilfully, unlawfully, deliberately and with premeditation, and with malice aforethought, kill and murder Robert A. Wright, a human being, by shooting Robert Wright in the head with a shotgun, from which he died.

COUNT II

> That the defendant, William Ray Wheeler, on or

> about the 22nd or 23rd day of March, 1984, in the County of Ada, State of Idaho, did use a firearm, to-wit: a shotgun, in the commission of the crime alleged in Count I.

The Petitioner was found not guilty of the Count II - gun enhancement- portion of the Information. It was undisputed that the deceased died of a shotgun wound to the head - there was no other suggested cause of death.

The State's case rested primarily on the testimony of an eyewitness to the shooting. Petitioner elected to remain silent at trial relying on the State's failure to prove beyond a reasonable doubt that Petitioner shot the victim.

At the close of the evidence at trial, the trial court, on its own motion, charged the jury with instructions regarding the culpability of an aider and abettor. These instructions were given over the objection of the defense. The jury, as indicated above,

found the Petitioner guilty of the lesser included offense of Murder in the Second Degree, but not guilty of using the gun in the commission thereof.

REASONS FOR GRANTING WRIT

The Petitioner submits that the United States Court of Appeals for the Ninth Circuit has not addressed the serious constitutional issues of law involved in this case. Petitioner does not dispute that Idaho statutory law has abolished the distinction between principals and accessories to a crime and that an accessory can be prosecuted and punished in the same fashion as a principal. Petitioner does not question the constitutionality of such a statutory scheme.

However, this is a case involving notice. The facts are relatively simple. Petitioner was not charged or otherwise notified that the State was seeking a conviction on a theory that Petitioner was an accessory. To the contrary, the State maintained throughout the trial that Petitioner was the sole perpetrator

of the crime. As a result, Petitioner asserted his right to remain silent and relied on the State's failure to meet its burden of proof that Petitioner was the sole killer. Then, after both sides rested, the trial court on its own motion gave the pertinent "aiding and abetting" instructions which provided an alternative theory of guilt. Petitioner was taken by surprise and thereby deprived of his right to adequate notice of the charges to be defended, and more importantly, his right to testify.

CONCLUSION

The trial court did not give the Petitioner an opportunity to testify. The trial court's instructions which created an alternative theory of guilt came as a complete surprise to Petitioner as reflected in the record and transcripts filed below. As a result, the surprise nature of these events effectively undermined the Petitioner's constitutional right to testify and refute this alternative theory.

DATED: August 19, 1987

RESPECTFULLY SUBMITTED

John C. Lynn
LYNN, SCOTT & HACKNEY
1024 W. Hays
Boise, Idaho 83702

APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM RAY WHEELER,	)	
	)	No. 86-3937
Petitioner-Appellant,	)	
	)	
-v-	)	D.C. No.
	)	CV-86-1067-
ARVON ARAVE,	)	HLR
	)	
Respondent-Appellee.	)	MEMORANDUM*
	)	

Appeal from the United States District Court for the District of Idaho
Harold L. Ryan, District Judge Presiding

Submitted April 19, 1987**

BEFORE: FLETCHER, REINHARDT and BRUNETTI, Circuit Judges

William Ray Wheeler was indicted for first degree murder in connection with the shooting death of Robert Wright. He

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

** The panel finds this case appropriate for submission without oral argument pursuant to Fed.R.Civ.P. 34(a) and 9th Cir. R. 3(f).

Was convicted of second degree murder. After exhausting his appeals in Idaho state courts, Wheeler filed a petition for writ of habeas corpus in federal district court. The court denied the petition, and Wheeler appeals. We affirm.

At trial, the prosecution premised its case on the theory that Wheeler shot Wright. Wheeler's defense was that Bob Paul, who accompanied Wheeler to the victim's home and later testified against Wheeler, actually shot Wright; Wheeler chose not to testify. The judge instructed the jury that those "who knowingly and with criminal intent aid and abet in (the crime's) commission . . . are regarded by the law as principals in the crime . . . and are equally guilty thereof." Wheeler contends that giving this instruction violated his due process rights and his right to testify because

he was not charged or otherwise notified that the prosecution was seeking a conviction on the theory that he was an aider and abettor.

Wheeler presents the precise question that we addressed in Carothers v. Rhay, 594 F.2d 225, 229 (9th Cir. 1979). In Carothers we held that an instruction on aiding and abetting was proper even though the prosecution presented its case on the theory that the defendant acted as a principal. We also found that charging the defendant as a principal serves as adequate notice of the fact that he also can be convicted of aiding and abetting. In this case, as in Carothers, state law provides that one who aids and abets in the commission of a felony is a principal. Idaho Code Sections 18-204, 19-1430. In light of Carothers, Wheeler must be presumed to have had notice of the fact when he

elected not to testify. Our controlling precedent requires that we reject Wheeler's contentions and affirm the judgment of the district court.

AFFIRMED

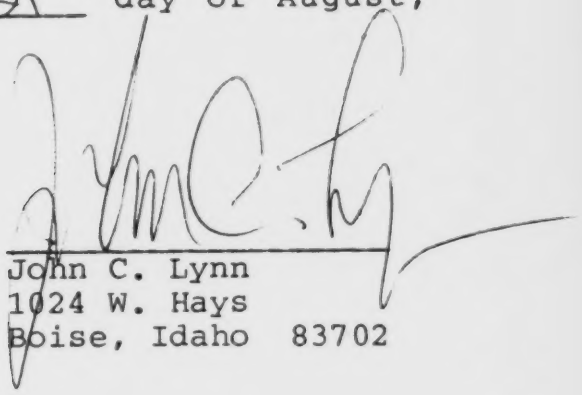
CERTIFICATE OF SERVICE

I, John C. Lynn, a member of the Bar of the Supreme Court of the United States and counsel of record for William Ray Wheeler, Petitioner herein, hereby certify that on the 21 day of August, 1987, pursuant to Rule 28, Rules of the Supreme Court, I served three copies on each of the parties herein, as follows:

On Arvon Arave, Respondent herein, by depositing such copies in the United States Post Office, Boise, Idaho, with first class postage prepaid, properly addressed to the office address of Jim Jones, Attorney General, the above-named Respondent's counsel of record at the Attorney General's Office, Statehouse, Room 210, Boise, Idaho, 83720.

All parties required to be served have been served.

DATED This 21 day of August, 1987.



John C. Lynn
1024 W. Hays
Boise, Idaho 83702